

## **Op-Ed on the Douglas Inquiry**

**By Professor Karen Busby and Dean Lorna Turnbull, Faculty of Law, University of Manitoba**

Judicial independence would be undermined if minor complaints could result in a judge's removal or if every complaint made about a judge had a full public airing. Judges can only be removed if their conduct is "so manifestly and profoundly destructive of ...the judicial role that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office."

Complaints about judges to the Canadian Judicial Council are first reviewed by a preliminary panel and, only if warranted, is the complaint subject to a full inquiry. In 2010-11, the council received 156 complaints. Only nine complaints have been referred to a full inquiry in the council's 40 year existence and the council has only once recommended that a judge be removed. The inquiry established to consider complaints against Associate Chief Justice Lori Douglas is scheduled to hear witnesses throughout the summer. It will then decide whether the evidence supports any of the allegations against her and, if so, whether her conduct was "so manifestly and profoundly destructive" as to warrant removal.

In 2003 Winnipeg lawyer Jack King harassed his client, Alex Chapman, by repeatedly suggesting that Chapman have sex with Douglas, King's wife. He also gave Chapman sex photos he had taken of Douglas. Chapman's new lawyer sent a complaint letter to the law firm where both King and Douglas practised complaining about King's harassment.

King and Chapman quickly reached a settlement. King apologized and paid Chapman \$25,000--far more than the average compensation in 2003 for sexual harassment complaints. Chapman promised to destroy the photos. Mutual non-disclosure agreements were signed. King was asked to leave the law firm and took a year-long medical leave. During this process, Chapman made no complaint about Douglas. Douglas became a judge in 2005 and was elevated to associate chief justice in 2009.

In 2010 Chapman unleashed a storm of controversy. He gave the sex photos, which he had not destroyed, to media. He also filed lawsuits totalling \$67 million against King, Douglas and their former law firm and complaints with their respective professional bodies.

The council's preliminary panel was of the view that the Chapman harassment complaint against Douglas did not warrant further consideration. But, especially as the sex photos made their way onto the internet in 2010, the panel determined that a full inquiry was in the public interest. Guy Pratte, independent counsel for the inquiry, has now completed his investigation. His summary of four specific allegations against Douglas, but not his full report, has been made public. Douglas who has been silent since 2010 has made a public response to the allegations through her lawyer Sheila Block.

Last month, the inquiry directed Pratte to "forcefully" present "the strongest case possible in support of the allegations against the judge." They determined that even if there was no

evidence to support an allegation, he did not have the discretion to exclude it. Pratte was told not to evaluate the strength of the evidence or even to include exculpatory facts in his summary.

Pratte had no choice following this ruling but to include an allegation asserting that Douglas participated in sexual harassment. The other three allegations are that the public availability of sex photos of a judge is inherently contrary to the integrity of the judiciary; Douglas improperly answered a question on the judicial application form; and Douglas failed to fully disclose facts to the independent counsel. This inquiry is the only one ever where the most serious allegations—harassment and availability of sex photos--rest on the wrongdoing of others. Every other case was about either bad behaviour in the court room or misuse of judicial office.

Pratte writes that Douglas “knew or ought to have known” that her husband was attempting to set up a something between her and Chapman. King has repeatedly stated, and Douglas has now confirmed, that she knew nothing about his mad scheme until the 2003 complaint letter against King. Moreover Block alleges Chapman saw King’s aberrant behaviour as a way to make himself and his lawyer rich.

Why did Chapman make allegations seven years after a fair and expeditious settlement of his sexual harassment complaint? Chapman asserts that he wanted to see justice done and that the incidents still caused him mental anguish. He has offered no reason for complaining about Douglas in 2010 but not in 2003. Block alleges Chapman believed that Douglas and another judge had recently conspired to force him to settle one of his actions against the police.

Chapman’s \$67 million lawsuits were withdrawn or summarily dismissed in late 2010. Bill Gange, King’s lawyer, says that he received a phone call from Chapman’s lawyer warning him that unless he dropped a motion to be reimbursed for some legal expenses for the dismissed lawsuit, photos of Douglas might appear on the internet. Gange refused. The day the motion was heard, the photos were uploaded. Chapman’s motives may include not only justice but perhaps also greed and revenge.

Many people have recorded their sexual activity. Opinions will diverge on whether participation in making sex photos prior to a judicial appointment is inherently contrary to the integrity of the judiciary. Douglas was victimized not only by her husband’s egregious act of distributing the photos but also by others who sent the photos to the media and maliciously posted them online. To us, it is troubling that a judge could be removed because she has been victimized by others or has participated in a common and lawful activity even if that activity is disturbing to some. We fear that the Douglas inquiry has a chilling effect on the willingness of women --who know that sexual double standards still exist-- to apply to be a judge.

Applicants for a judgeship are asked “is there anything in your past or present which could reflect negatively on yourself or the judiciary?” Should they check the “yes” box if they have a child whose drug addiction brings them in conflict with the law? A spouse whose gambling habits have led to unacceptable financial risk-taking? A father who has served a long jail term?

Douglas checked the “no” box as she had done nothing wrong and believing that the Chapman matter had been fully settled and the photos destroyed.

Douglas discussed the 2003 events in subsequent interviews with those involved in the appointments process. As the harassment complaint and the photos had become an open secret in Winnipeg’s legal community, some senior members of the bench and bar were asked for their opinions on her suitability. No one indicated that either the complaint or the photos should impede her appointment. In our view, Douglas’ “no” answer did not mislead anyone and the 2003 events were thoroughly vetted. Her failure to check the “yes” box is unlikely to meet the “profoundly destructive” test.

Had Pratte, as independent counsel, been afforded the usual prosecutorial discretion in professional discipline matters, the fourth allegation involving Douglas’ failure to disclose during the investigation might not have warranted further consideration. Instead the inquiry will now have to hear evidence about Douglas’s deteriorating mental state as the inquiry dragged on.

This hearing will be deeply humiliating for Douglas, King and Chapman. Anyone who cares to can find out details of Douglas’ husband’s unimaginable act of betrayal, their sexual practises, and her mental health. King and Chapman will face grueling cross-examination about their motives. If the inquiry had not insisted, in effect, that independent counsel include the Chapman complaint despite its obvious weaknesses, most of this spectacle could be avoided.

None of the allegations of wrongdoing by Douglas herself, in our view, ought to be grounds for removal but the process chosen by the inquiry may itself irretrievably damage her capacity to serve as a judge.